

# **VIRGINIA AQUATIC RESOURCES TRUST FUND**

## **AMENDMENT TO MEMORANDUM OF UNDERSTANDING BETWEEN THE NATURE CONSERVANCY AND THE U.S. ARMY CORPS OF ENGINEERS**

05AUG1995-Date of Original MOU / 18DEC2003-Date of Amendments

This Amendment to Memorandum of Understanding ("Amendment") between the U.S. Army Corps of Engineers, Norfolk District, (hereinafter "Corps") and The Nature Conservancy of Virginia, trustee, (hereinafter "the Conservancy") updates and amends the Virginia Wetlands Restoration Trust Fund Memorandum of Understanding of August 18, 1995 (as amended hereby, the "MOU"), by title and as described below. The purpose of this Trust Fund is to establish an additional mechanism to provide compensatory mitigation for impacts to aquatic resources authorized by Clean Water Act or Virginia Water Protection permits while maximizing the mitigation benefit to the aquatic environment and the public interest. The Corps and the Conservancy agree to follow the procedures set forth in this MOU. For the purposes of this MOU, the term "aquatic resources" means all waters of the United States subject to Corps regulation and all waters of the state subject to regulation by Virginia Department of Environmental Quality (hereinafter "DEQ") Virginia Water Protection Permits. The Conservancy has demonstrated extensive experience in land acquisition, land protection, natural systems, resource management, and stewardship.

### **1. PURPOSE and GOALS**

In Corps and Virginia Department of Environmental Quality (hereinafter "DEQ") permit approval cases where avoidance and minimization of impacts to aquatic resources have been considered to the maximum extent practicable, or have been determined to be not in the best interest of the aquatic environment, it is desirable to provide for a mechanism to allow off-site mitigation for the loss of aquatic resources occasioned by the issuance of permits. The purpose of this Amendment is to amend the Virginia Wetlands Restoration Trust Fund of August 18, 1995, to provide an additional compensatory mitigation alternative for permit actions involving (a) Corps General Permits (b) DEQ General Permits, (c) Corps and DEQ Individual Permits and unauthorized activities impacting less than three (3) acres of waters (including wetlands) other than streams and/or less than two thousand (2,000) linear feet of streams, and (d) in other cases if agreed upon by the Corps, DEQ and the Conservancy (in each instance in subparts (a), (b), (c), and (d), a "Permit" or resolution of an unauthorized activity). A primary function of the Fund is to restore and preserve as many aquatic resources, buffers, and other beneficial lands in their natural condition as possible with the funds available.

### **2. MITIGATION RESOURCES**

Mitigation resources shall consist of funds paid as mitigation by permit applicants to compensate for losses to aquatic resources in connection with issuance or verification of Corps or DEQ permits, resolution of unauthorized activities, or other cases as agreed upon by the

Corps, DEQ, and the Conservancy as specified in Section 1. Said funds shall be delivered to the Conservancy in cash or by certified check, to be held in the Fund and used by the Conservancy solely to accomplish mitigation projects as described herein. The Conservancy hereby agrees to receive and expend said funds in the manner and with the limitations described herein.

### **3. PROGRAM OPERATION**

A. This Trust Fund may be used as compensatory mitigation for Corps and DEQ permit actions or resolution of unauthorized activities as determined appropriate by those agencies and as set forth below. The primary emphasis of the Fund is on aquatic resource restoration and protection. The use of this Fund for compensatory mitigation shall occur only after the relevant permitted activity has complied with Corps and DEQ regulations and policies regarding avoidance and minimization of impacts or as stated in Section 1 or otherwise herein. The Conservancy, pursuant to the terms of this MOU, will act as a recipient of mitigation funds that are required of permittees. The Conservancy shall play no role in the Corps' or DEQ's decision to approve or deny a Permit or whether mitigation is a necessary condition of any such permit, except that:

1) The Conservancy shall receive fifteen (15) days written or email notice from the Corps prior to decisions approving use of the Trust Fund as mitigation for actions impacting greater than three (3) acres of waters (including wetlands) other than streams and/or more than two thousand (2,000) linear feet of streams, during which time the Conservancy may accept or decline, by written notice to the Corps, payment into the Fund. Notification to the Conservancy may be accomplished by providing the Conservancy a copy of the public notice relating to an activity.

2) By written notice to the Corps, the Conservancy may decline funds from any actions that negatively impact Virginia Natural Heritage element occurrences.

3) The Conservancy may suspend or decline mitigation payments into the Fund for stream impacts and mitigation with written notice to the Corps. Any new applications received by the Corps after 180 days following the date of notification shall not be eligible for payment into the Fund. Any monies in the Fund that were generated from stream impacts, including interest earned thereon, that are not allocated to stream mitigation projects, may be paid to not more than ten (10) different entities as directed by the Corps. The associated mitigation liability will also be transferred accordingly.

4) Written notices shall be made to The Nature Conservancy, 940-B Corporate Lane, Chesapeake, VA 23320, with copy to The Nature Conservancy, 490 Westfield Road, Charlottesville, VA 22901.

B. The Corps will determine the amount of in lieu fee due as mitigation from permittees. The Corps, after seeking comments from DEQ, shall approve or deny specific Trust Fund mitigation proposals for restoration, creation, enhancement, buffering, preservation of aquatic resources and their adjacent uplands, or the purchase of credits from an approved mitigation bank. Such approval or denial will be based on factors including site suitability, impacts to

aquatic resources mitigated via the Fund, the ratio of restoration to impacts of Fund projects in particular watersheds, maximum return on expended funds, benefits to rare and endangered natural resources, the location and status of other mitigation projects, the level of threat to the aquatic resources and upland buffers contained in the proposal, and an acceptable mitigation plan.

C. To offset impacts to aquatic resources that resulted in payments into the Fund, the Conservancy shall submit proposals for funding approval in accordance with this MOU. Project specific proposals should include, if applicable, a description of the proposed project and site specific plan including location, baseline conditions, what kind of compensation can be provided, a schedule for conducting the project, monitoring and maintenance provisions, provisions for protection in perpetuity with real estate arrangements, and performance standards for determining ecological success of mitigation sites. Proposals may request funding approval for costs associated with accomplishment of mitigation projects including, but not limited to labor, land acquisition, appraisals, project design, project management, restoration, creation, monitoring, stewardship, legal, closing, equipment and materials necessary to accomplish mitigation and monitoring. Proposals to cover labor costs for Conservancy personnel require written consent of the Corps and shall not include administration or overhead costs. These labor cost proposals may be submitted separately to address project management for multiple projects and/or fixed periods of time. The Conservancy shall track the time of any such personnel, and only labor (duties and tasks) directly related to accomplishing Trust Fund activities shall be charged to the Trust Fund. The Corps and the Conservancy shall decide when to hire outside contractors, parties, or consultants to accomplish mitigation projects and remediation via the normal approval process for mitigation proposals as stated herein. Primary considerations in all mitigation project proposals and approval decisions shall be the benefit to the waters of the Commonwealth of Virginia and the most cost effective approach to accomplishment of mitigation projects. This will maximize the quality, size, number, and scope of mitigation projects, which is in furtherance of the public's interest in its waterways. All Trust funds shall be used solely for the delivery and accomplishment of compensatory mitigation as described herein, and no Trust funds may be expended except as provided for in this Agreement. The funds described in paragraph 7, administrative fees that go to the Conservancy, do not require Corps approval for expenditure.

D. This Trust Fund is responsible for implementation and success of approved mitigation proposals and for the repair and remediation of mitigation projects that are unsuccessful. The parties to this agreement shall ensure that an amount equal to 20% of restoration costs for each project shall remain in the Fund for the entirety of the monitoring period as stated in the approved restoration plan for each project, which funds may be used to repair or remedy unsuccessful or failing mitigation projects. All remediation or repair activities shall be conducted as agreed upon in advance by the Corps and the Conservancy. In the event of termination of this MOU in whole or in part, this reserve fund shall be paid as directed by the Corps to not more than ten (10) recipients. The Conservancy shall be permitted to retain such funds for the mitigation projects that it has completed for the remainder of the monitoring period for each such project for insuring monitoring obligations are met. At the end of the monitoring period, the Conservancy shall seek disbursement instructions from the Corps as to any unexpended funds and shall disburse the funds in accordance with Corps instructions. Failing

sites that the Corps determines should not be remediated may be sold, and proceeds from the sale shall be returned to the Fund to be used for other mitigation projects pursuant to this MOU. Funds received and mitigation projects accomplished through this Fund shall occur within the Commonwealth of Virginia.

E. The Trust Fund shall operate separately from Corps and DEQ regulatory actions except as specified in this MOU.

#### **4. MITIGATION GOALS**

A. Regarding mitigation ratios for activities impacting wetlands and aquatic systems permitted by the Corps or DEQ, a primary goal is to ensure that there is no net loss of acreage, functions, and values for compensatory mitigation accomplished for impacts to aquatic resources of the type and within the watersheds of those impacts. The most current Norfolk District Corps and DEQ mitigation guidelines (i.e. mitigation ratios) or approved functional value methodology shall be utilized to assess and meet this goal. Complementing the 'no net loss' goal stated above, the parties shall use their best efforts to accomplish mitigation projects in Virginia efficiently and at beneficial economies of scale to provide for a significant net gain of aquatic resource functions and values where possible.\_

B. The Corps shall maintain a running total of impacted and mitigated aquatic resources, by type and watershed, for which the Fund was used to mitigate impacts. These data shall be shared with the Conservancy and used in the site selection process, if practicable, to attempt to mitigate impacts in watersheds where they occurred as stated above. The Conservancy will try to use funds accepted from a number of permitted projects collectively so as to maximize the size and/or quality of mitigation sites available for preservation, restoration, or creation. This is to attempt to provide favorable mitigation ratios for aquatic resource impacts, and to provide greater assurance of permanent protection of high quality natural areas in a quality landscape context.

#### **5. CONSULTATIONS AND APPROVAL**

The Conservancy's staff shall consult with the Corps prior to submittal of proposals for specific tracts of land and water. The Conservancy shall expend funds on projects only after consultation with, and only after written approval by the Corps. The Corps shall consult with DEQ with respect to all mitigation project proposals for which the Fund is intended to be utilized.

#### **6. FINANCIAL CONTROLS**

The Conservancy shall hold any funds collected pursuant to this MOU in an interest-bearing account in an investment instrument or banking institution so as to earn interest while maximizing the safety and preservation of the principal funds in the account. The Conservancy shall account for the funds so held, in accordance with generally accepted accounting principles, and the account shall be subject to audit by the Corps from time to time. The Conservancy shall provide the Corps with the account statements it receives from all financial institutions holding

the funds within 30 days of the date such account statements are issued. Interest earned by the Fund and proceeds from the sale of Fund project lands shall remain with the Fund. At or prior to the time of sale, Fund project lands other than those referenced in Section 3D, shall be placed under perpetual conservation easements that shall run with the land and not be affected by transfer of the land. In appropriate circumstances, portions of properties not used for mitigation can be excepted from easements. Those approved funds in excess of the amount needed for mitigation or restoration projects shall remain with the Fund and shall be disbursed in accordance with this MOU for other proposed projects. The Conservancy shall not be required to give bond or security pursuant to this MOU. The Fund established pursuant to this MOU shall be referred to as the "Fund" or the "Trust Fund" for the convenience of the parties, but this MOU shall not be deemed to establish or qualify as a trust under state or federal law.

**7. ADMINISTRATIVE OVERHEAD AND INTEREST**

In lieu of any other fee or commission as may be permitted by law, the Conservancy shall receive an overhead fee amounting to 3% of the funds when the funds are deposited. The fee will come from the funds and is deemed to represent and reimburse reasonable overhead and related administrative costs of administering the Trust to accomplish the mitigation projects described herein.

**8. TIME FRAME**

All moneys from this account should be allocated to specific projects approved by the Corps within three years of the date the funds are received. If more than three years pass from the date of receipt of funds and the funds have not been so allocated, the Corps may direct that the funds be allocated to any project or proposal that it deems appropriate and mitigation liability to the Fund be reduced accordingly and transferred to the receiving party. If such project or proposal will be accomplished by another organization, the Conservancy will transfer the amount of funds directed by the Corps to that other organization. The Corps in its discretion may allow extensions of the three-year time limit.

**9. GOOD FAITH**

The parties hereto agree that both shall exercise their rights and obligations in good faith as contained in this MOU.

**10. AMENDMENT AND TERMINATION**

Either party may terminate this MOU by giving ninety (90) days written notice to the other party. Amendments require written approval by both the Corps and the Conservancy. Prior to termination, the Conservancy shall provide an accounting of funds and shall complete payment on contracts for projects approved by the Corps and any expenses incurred on behalf of the account. Upon termination, after payment of all outstanding obligations as provided in Section 8 above, the remaining funds in the Trust shall be paid to not more than 10 different entities as determined by the Corps.

IN WITNESS WHEREOF, the parties have caused to be duly executed two duplicate originals of this Amendment as of the date first above written.

THE NATURE CONSERVANCY,  
a District of Columbia non-profit corporation

By: \_\_\_\_\_  
Its: Vice President

COMMONWEALTH OF \_\_\_\_\_)  
CITY/COUNTY OF \_\_\_\_\_)SS:

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2003 by Michael L. Lipford as Vice President of The Nature Conservancy, a District of Columbia non-profit corporation, on behalf of the corporation.

\_\_\_\_\_  
Notary Public  
My Commission Expires:

U.S. ARMY CORPS OF ENGINEERS

By: \_\_\_\_\_  
Its: District Engineer, Norfolk District

COMMONWEALTH OF \_\_\_\_\_)  
CITY/COUNTY OF \_\_\_\_\_)SS:

On this \_\_\_\_ day of \_\_\_\_\_, 2003, before me personally came William A. Sorrentino, Jr., P.E., to me known, who, being by me duly sworn did depose and say that he is the Acting District Engineer of the Army Corps of Engineers, Norfolk District, described in and which executed the foregoing instrument.

\_\_\_\_\_  
Notary Public  
My Commission Expires: